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April 21, 2014

Representative XXXX
YYYY
Washington, DC 20515

I am writing you with regard to NTIA - The National Telecommunications and Information Administration - and ICANN - The Internet Corporation for Assigned Names and Numbers.

I am the only person who has ever been - and probably ever will be - elected by the public of North America to a seat on ICANN's Board of Directors.

I am also an internet technologist - I've written internet standards that have been adopted by the IETF, I've been a principle in several internet start-ups, I've received the Norbert Wiener Award for Social and Professional Responsibility. and I have been named a fellow of law and technology at Cal Tech and Loyola Marymount. I am also a member of the California Bar and its Intellectual Property section. You can learn more about me on my website: <http://cavebear.com/>

There has been much press about NTIA's recent announcement that it will relinquish its oversight role over ICANN. That announcement has engendered considerable discussion, including a hearing earlier this month by the House Judiciary Committee.

Unfortunately much of the testimony is inapt, serving largely as a distraction to avert our eyes from the real issues. Beneath the layers of distraction one finds that the issues are the same things that Machiavelli wrote about so many centuries ago: power, money, and authority.

In nearly every submission one will read words about "assuring the technical stability of the internet".

"Technical stability" seems like a subject unlikely to engender much conflict. Yet ICANN is a cauldron boiling with heated debate.

ICANN received roughly \$400,000,000 in revenue in the year 2013. That is a surprisingly large amount of money for "technical stability". Is there something else that might induce people to pay large amounts of money to ICANN?

The answer is that ICANN does vanishingly little with regard to the technical stability of the internet and, instead, uses its de facto monopoly position to do a land office business selling rights to internet territory.

ICANN does not "assure the technical stability of the internet". Rather, ICANN dispenses commercial rights and privileges.

In exchange for its largess ICANN obtains monopoly rents, significantly restricts legitimate and innovative business practices, and imposes expansive trademark protection well beyond what is required by any law of any nation.

ICANN is a private regulatory body that promotes its particular view of social engineering, internet business practices, trademark protection, and preservation of incumbent interests.

The issue currently coming before Congress is whether to allow NTIA to step away from its oversight role over ICANN.

Most of the pages written on this subject have cast the issue as a choice between a "free" internet and an internet controlled by international organizations or foreign countries.

That is a mis-characterization.

Rather this is a fight for control, for authority, for money.

One should not underestimate that last point - money. ICANN has ensconced incumbent providers - such as Verisign - and endowed them with almost guaranteed perpetual revenue streams that amount to the better part of a billion dollars each year, year-in and year-out, (from which ICANN extracts a tithe.) And as the TV commercials say, the value of ICANN to those who seek to expand the protection of trademarks, is priceless.

And the fight is really not just over ICANN. It is a fight over the model to be used for other, future ventures into internet governance.

Over the years NTIA has exerted precious little oversight over ICANN. NTIA has not required ICANN to deeply engage with the issues for which ICANN was created: protection of the technical stability of the internet's domain name system. Nor has NTIA exerted much pressure to nudge ICANN towards becoming what ICANN professes to be - a body that exists for the benefit of the community of internet users, a body that is accountable to the community of internet users, and a body in which decisions are made with transparency.

NTIA's role in ICANN has largely been to shield ICANN from questions, most particularly questions that would normally arise about a private body that restrains trade and innovation.

One must ask whether that behavior constitutes oversight at all. Or has an absence of oversight by NTIA allowed ICANN to become a permissive playground for financially interested entities to promote private agendas?

If so, is that the kind of "oversight" that is worth retaining? I think you would agree with me that the answer is a definite "no".

Yet there is no doubt that ICANN needs oversight - real oversight. ICANN is a body that is in great need of supervision.

Rather than framing the question coming before Congress as one of releasing ICANN from NTIA oversight it would be more appropriate to frame the question thus:

To whom will ICANN be accountable, and how?

In theory ICANN, because it is a corporation, would be accountable to its Board of Directors. Unfortunately, in ICANN practice that is a fantasy. For example, when I was on ICANN's Board of Directors I attempted to exercise a power that California law clearly gives to corporate directors. As a sitting director I asked to inspect ICANN's financial ledgers. ICANN fought me tooth and nail. I eventually obtained a court order that forced ICANN to open its books. Subsequently ICANN erased the system through which the public could nominate and elect a small minority of directors. In the place of elections ICANN substituted a captive, dependent, "company union" that places multiple layers of insulation between ICANN and the public. In the years since that event ICANN has restructured itself to even further emasculate its Board of Directors and insulate itself from accountability to anyone.

The broader issue behind NTIA-ICANN is that of governance of the internet. Good governance is accountable governance. But it may well be that we are moving towards internet governance in which accountability is rare and weak.

Much of the current "debate" about ICANN is couched in terms of relaxing the oversight of the US over ICANN (and a thing called IANA - more about IANA later in this letter.) There is a fear - a fear that to my mind is overextended and hyperbolic - about takeover of the internet by other nations or an international body (such as the UN or the ITU).

ICANN is indeed bent on becoming an international body, free from responsibility to *any* nation or treaty organization.

ICANN is not looking for a change in putative masters; ICANN is looking for independence.

For several years ICANN has been exploring strategies to remove itself from oversight from the US - and from everyone else. Among the things ICANN has examined is how ICANN might obtain a special statute from a protective country (typically Switzerland) and leap away from from ICANN's status as a California public-benefit/non-profit corporation and US 501(c)(3) tax exempt organization.

ICANN represents a new kind of thing under the sun. The internet is eroding the authority from traditional nation-states. The granules of that authority are not disappearing; rather they are aggregating into the new kind of sovereignty that ICANN represents. Unfortunately, that aggregation of authority is not accompanied by any system of accountability except that which ICANN (or rather those who wag ICANN) chooses, voluntarily, to impose upon itself.

The real question before us is not a choice about NTIA and ICANN. Nor is it a choice about foreign control of the internet. Rather it is a choice about how to do two things:

- Diminish the perception by those outside the US that ICANN is a tool of US hegemony over the internet.
- Coerce ICANN so that it becomes, in fact rather than in word, accountable to the community of internet users. Or, to put it another way: Coerce ICANN so that it manages the technical stability of the internet for the benefit of the community of internet users rather than for a few insider commercial interests.

Releasing ICANN from NTIA oversight would have an effect on the first of these goals. But freedom from NTIA would have no positive effect on the second and, in fact, may cause ICANN to go even further retrograde.

I said that I would come back to a thing called IANA - the Internet Assigned Numbers Authority.

Magic tricks often involve a distraction so that the audience looks elsewhere while the magician does his work. IANA is one of ICANN's favorite means to distract attention.

The internet is composed many technical agreements - typically called "protocols". In these agreements are various numbers and names - similar in concept to the ISBN numbers assigned to books or license plate numbers attached to cars. For the most part the assignment of these numbers is done the same what that "take a number" machines work in bakeries - each number is a simple increment of the previously dispensed number.

IANA is the body that assigns, records, and publishes these "protocol parameters". It is an important job. And it is a job that needs to be done accurately and efficiently.

But IANA is essentially a clerical job that usually involves no significant amount of discretion. (And in those rare cases where technical discretion is needed the various technical standards organizations, such as the Internet Engineering Task Force - the IETF - provide specific guidance and designate experts to be consulted.)

There is no particular reason why ICANN and IANA are bundled into the same organization. IANA could be handled by any competent clerical provider - such as an established accounting firm. Rather than being a parent organization to IANA, ICANN could just as well be a client for IANA services.

Because ICANN is essentially a body that regulates economic and business matters - and is thus subject to storms of debate from financially interested groups - it would be better for IANA to be held separate from ICANN and allowed to do its clerical job in peace and avoid being dragged into matters in which it has no interest and no role.

These are complex matters. There is a tendency for many people to accept claims that these are arcane technical disputes that should be left to "the techies". That tendency should be strongly resisted. These are matters that can be, and need to be, faced by those outside of the technical community.

Members of Congress can understand these issues and are capable of making good choices.

I suspect that ICANN is not on your list of hot issues. It is probably not on the hot list of many members of Congress. And that is why ICANN and NTIA have been able to glide under the radar for nearly fifteen years.

My request to you is this:

- In the long term please take some time to become more engaged with the issues of governance of the internet in general and ICANN in particular.

- In the short term recognize that the immediate question of NTIA and ICANN is not about US versus foreign influence but rather about whether ICANN will be subject to effective oversight or be accountable to anyone. ICANN has not demonstrated that it is willing to make itself accountable. One way or the other ICANN ought to be subject to oversight – and that oversight ought to be more real and substantive than it has been.

If you would like to ask questions or have a follow-up discussion I am easily reached by email or telephone.

Thanks!

Sincerely,

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